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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 179.

FARBWERKE VORMALS MEISTER LUCIUS & BRUNING, DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT VORM., ETC., ET AL., PETITIONERS,

vs.

CHEMICAL FOUNDATION, INC.; E. I. DU PONT DE NEMOURS & CO., ETC., ET AL.

No. 180.

FARBWERKE VORMALS MEISTER LUCIUS & BRUNING, PETITIONERS,

vs.

E. I. DU PONT DE NEMOURS & CO. AND WALTER O. WOODS, AS TREASURER OF THE UNITED STATES.

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No. 182.

BADISCHE-ANILIN & SODA-FABRIK, PETITIONER,

vs.

E. I. DU PONT DE NEMOURS & CO. AND WALTER O. WOODS, AS TREASURER OF THE UNITED STATES.

Brief for the Petitioners Badische-Anilin & Soda-Fabrik and Deutsche Gold & Silber Scheide Anstalt.

ALMUTH C. VANDIVER,
Of Counsel for Petitioners.

[OVER]

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Argued by
ALMUTH C. VANDIVER.

Supreme Court of the United States

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No. 271.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, PETITIONER,

vs.

THE CHEMICAL FOUNDATION, INC., AND E. I. DU PONT DE NEMOURS & CO.

No. 272.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, PETITIONER,

vs.

FARBWERKE VORMALS MEISTER LUCIUS & BRUNING, E. I. DU PONT DE NEMOURS & CO., AND WALTER O. WOODS, AS TREASURER OF THE UNITED STATES.

No. 273.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, PETITIONER,

vs.

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT VORM. ROESSLER, E. I. DU PONT DE NEMOURS & CO., AND WALTER O. WOODS, AS TREASURER OF THE UNITED STATES.

No. 274.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, PETITIONER,

vs.

BADISCHE-ANILIN & SODA-FABRIK, E. I. DU PONT DE NEMOURS & CO., AND WALTER O. WOODS, AS TREASURER OF THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for the Petitioners Badische-Anilin & Soda-Fabrik and Deutsche Gold & Silber Scheide Anstalt.

Opinions Below.

The opinion of the Circuit Court of Appeals, Third Circuit, (R., ff. 251-259, pp. 182-195) is reported in 39 F. (2d) 366 sub nom. *Farbwerke vormals Meister Lucius & Bruning et al.* v. *Chemical Foundation.*

The opinion of the District Court for the District of Delaware (R., ff. 176-190, pp. 136-148) is reported in 29 F. (2d) sub nom. *Chemical Foundation* against *E. I. du Pont de Nemours & Co.*

Jurisdiction.

The decree sought to be reviewed by the petitioners Badische Anilin & Soda Fabrik and Deutsche Gold & Silber Scheide Anstalt, was entered by the District Court for the District of Delaware on December 15, 1928 (R., ff. 191-194, pp. 148-151) and was affirmed by the Circuit Court of Appeals, Third Circuit, on March 4, 1930 (R., ff. 259-266, pp. 195-200).

The petition for writs of Certiorari was filed by these petitioners June 4, 1930, and was granted October 13, 1930 (R., ff. 269-276, pp. 201-203).

The jurisdiction of this Court is invoked under Section 347 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Act of Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

Question Involved.

May suit be maintained by a former enemy owner of a patent, seized and assigned by the Alien Property Custodian, to obtain fixation of a reasonable royalty for the use of such patent by an American corporation under Federal Trade Commission license, for the period of use prior to disposition of the patent by the Alien Property Custodian?

Statutes Involved.

The pertinent provisions of the statutes and Executive Orders involved are as follows:

Section 10, subsections (c), (d), (e), (f) and (g) of the Trading with the Enemy Act (Act of October 6, 1917, ch. 106, 40 Stat. 411) is as follows:

> "(c) Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label, or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufacture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label or copyrighted matter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding $100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages,

royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof.

(d) The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to the licensee as established by the President; and sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (f) of this section, or upon the direction of the alien property custodian.

(e) Unless surrendered or terminated as provided in this Act, any license granted hereunder shall continue during the term fixed in the license or in the absence of any such limitation during the term of the patent, trade-mark, print, label, or copyright registration under which it is granted. Upon violation by the licensee of any of the provisions of this act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him.

(f) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the

war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trademark, print, label, or copyrighted matter: *Provided, However,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment or decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the

licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable.

(g) Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war; *Provided*, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of federal courts."

Section 12 as originally enacted is as follows:

"All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and re-invested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

* * * * * * *

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien

property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine thereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further,* That the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee."

Paragraph four (*idem*), as amended by Act of March 28, 1918, is as follows:

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof. * * * The alien property custodian shall

forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

Executive Order of October 12, 1917, is, in part, as follows:

> "I hereby vest in the Federal Trade Commission the power and authority to issue, pursuant to the provisions of Section 10 (c) of the Trading with the Enemy Act, upon such terms and conditions as are not inconsistent with law, or to withhold or refuse a license to any citizen of the United States, or any corporation organized within the United States, to manufacture or cause to be manufactured a machine, manufacture, composition of matter, or design, or to carry on or cause to be carried on a process under any patent, or to use any trade-mark, print, label, or copyrighted matter owned or controlled by an enemy or ally of enemy, at any time during the present war; and also to fix the prices of articles and products manufactured under such licenses necessary to the health of the military and the naval forces of the United States, or the successful prosecution of the war; and to prescribe the fee which may be charged for such license, not exceeding $100 and not exceeding 1 per cent. of the fund deposited by the licensee with the alien property custodian as provided by law" (R., ff. 126-127, pp. 96-97).

Section 19 of the Settlement of War Claims Act of 1928 is as follows:

> "Sec. 19. Subsection (f) of section 10 of the Trading with the Enemy Act, as amended, is amended by adding at the end thereof the following new paragraph:
>
> 'In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred or delivered to the Alien Property

Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trade-mark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label, or copyright, was seized or otherwise acquired by the Alien Property Custodian.'"

Statement.*

Provisions of the Trading With the Enemy Act as Originally Enacted.

The Trading with the Enemy Act became effective October 6, 1917 (Act of October 6, 1917 ch. 106; 40 Stat. 411).

Provision was made therein for the application by American citizens and corporations "at any time during the existence of a state of war" for license to use enemy owned patents. The President was authorized if he was of the opinion that issuance of the license would be for the public welfare to grant the application therefor and to fix the conditions of the license and the fee therefor (subs. [c]).

Provision was also made therein that the licensee should file with the President full statement of the

*NOTE: Hereinafter the respondent E. I. du Pont de Nemours & Co. is referred to as "DuPont"; the respondent Chemical Foundation, Inc. is referred to as the "Foundation"; the petitioners Farbwerke vormals Meister Lucius & Bruning, Deutsche Gold & Silber Scheide Anstalt vorm. Roessler and Badische Anilin & Soda-Fabrik are referred to as the "alien petitioners"; the respondent Frank White, as Treasurer of the United States, the respondent Walter O. Woods, as Treasurer of the United States, and the petitioner Walter O. Woods, as Treasurer of the United States are referred to as the "Treasurer"; and the Alien Property Custodian is referred to as the "Custodian".

extent of his use. The licensee was also required to pay to the Custodian not to exceed five per centum of the gross sums received by him or five per cent. of the value of the use. Moneys paid as fees by such licensees to the Alien Property Custodian should be deposited forthwith in the Treasury of the United States (subs. [d]).

Provision was also made therein that such payments should be a trust fund for the licensee and the owner of the patent (*idem.*).

The owner of the patent contemplated by the statute was the enemy owner as there had been no seizure of the patent and no legislation authorizing seizure and as the context of the statute clearly shows.*

Provision was further made in the Trading with the Enemy Act for the payment of the license fee funds, from the Treasury, upon the order of the Court, or upon the direction of the Alien Property Custodian (subs. [d]).

Provision was further made therein for the institution by the owner, within one year after the end of the war, of a bill in equity against the American licensee, in the District Court of the licensee's residence, for recovery from the licensee, for all use of the patent. To this suit the Treasurer of the United States was a necessary party. Notice to the Alien Property Custodian of institution of suit was also required (Subs. [f]).

The District Court was authorized to decree payment of a reasonable royalty to the owner (Subs. [f]).

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*The report of the House Committee on Interstate and Foreign Commerce attached to the report of the Senate Committee on Commerce, as an appendix, clearly shows that the enemy owner is the owner contemplated by the Congress. At p. 13 of the House report the following appears:

> "*The enemy patentee* (italics ours) may within a year after the end of the war file a bill in equity against the licensee in the United States District Court for the district in which the licensee resides, or, if a corporation, in which it has its principal place of business, for the recovery from the licensee for all use and enjoyment of the patented invention. * * * " (H. Rept. No. 85, 65th Cong. 1st sess.; Senate Rep. No. 113, accompanying H. R. 4960—65th Cong. 1st sess.)

Any and all defenses were permitted to the licensee (Subs. [f]).

The amount of any final judgment was to be paid, upon order of the Court, from the fund deposited by the licensee so far as available. Any balance was to be returned to the licensee (Subs. [f]).

If no suit was brought by the owner, or no notice of suit was filed with the Alien Property Custodian, the licensee was not liable to make any further deposits and all funds deposited by the licensee, upon order of the Custodian, were to be repaid to the licensee (Subs. [f]).

The Court was authorized, in case the licensee had made capital investments based on possession of the license, to continue the same for such period and upon such terms and with such royalties as it should find to be just and reasonable. The Court was also authorized to terminate the license and enjoin the licensee from infringement (Subs. [f]).

Enemies were permitted to institute and prosecute suits to enjoin infringements by any persons other than licensees (Subs. [g]). Enemies were also permitted to file and prosecute patent applications (Subs. [g]).

Section 12 provided that, after the end of the war any claims of an enemy to money or property, deposited in the Treasury should be settled as Congress shall direct. However, on order of the President, as set forth in Section nine or of the Court as set out in Sections nine and ten the Custodian or the Treasurer was required to pay out *enemy property*. And on order of the Custodian the Treasurer was required to return *funds* deposited by licensees.

Federal Trade Commission Licenses.

On October 12, 1917, by Executive Order, the President delegated his licensing power to the Federal Trade Commission (R., ff. 126-127, pp. 96-97).

On January 21, 1918, the Federal Trade Commission granted to E. I. DuPont DeNemours & Co., a corporation (hereinafter referred to as DuPont), on its application, license (No. 19), to make, use and vend indigo within the United States under letters patent numbered 718,340, then owned by the petitioners Badische Anilin & Soda-Fabrik, and license (No. 19) under letters patent numbered 680,395 then owned by the petitioner Deutsche Gold & Silber Scheide Anstalt. These licenses, among other things, provided that any sums due thereunder should be a debt due to the People, recoverable in an action by the People (R., f. 33, p. 30).

The license, as originally issued to DuPont, required the payment to the Alien Property Custodian of a royalty of 5% of the net profits derived from the sale of the products resulting from the licensed use (R., f. 30, p. 28).

The statute provided that the licensee should pay "not to exceed five per centum of the gross sums received by the licensee" from the sale of the licensed inventions, or, if the President so ordered, "five per centum of the value of the use" of such inventions to the licensee (Subs. [d]). The words "net profits" appearing in the license do not appear in the statute.

Under the license, in the original form, no payments were ever made by DuPont (R., f. 52, p. 44).

On January 14, 1920, the license to DuPont was altered by the Federal Trade Commission to provide for the payment by DuPont of 2% of the gross amounts received from the sale of products, manufactured under the patents aforesaid, from and after August 1, 1919 (R., f. 35, p. 32).

Subsequent to August 1, 1919, DuPont paid, under this license, to the Alien Property Custodian, $61,884.98 which it represents to be 2% of the gross amount received by it from the sale of indigo from and after August 1, 1919 (R., f. 51, p. 43).

No royalty payment for use between January 21, 1918 (the date of the original license) and August 1, 1919, has ever been made by DuPont to the Alien Property Custodian. The license was terminated and cancelled on September 1, 1920 (R., f. 37, p. 34).

Amendments to the Trading With the Enemy Act of March 24, 1918.

Congress, by an Act, approved March 24, 1918, amended paragraph 4 of Section 12 of the Trading with the Enemy Act (describing the Alien Property Custodian as a common law trustee) to provide that as to any property, *except money*, seized, the Custodian might exercise any rights or powers appurtenant thereto "as though he were the absolute owner thereof" (40 Stat. 459).

On November 4, 1918, Subdivision (c) of Section 7 was amended to authorize the seizure of patents "choses in action and rights and claims of every description" belonging to an enemy (40 Stat. 1020).*

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*As amended:

"If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President, after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered or recorded."

Seizures of Patents in Suit by Alien Property Custodian.

Feb. 3, 1919. The Alien Property Custodian addressed a demand to "Badische Anilin & Soda Fabrik, Ludwigshafen am Rhine, Germany; Messrs. Hauff & Worland, 41 Park Row, N. Y.; The Commissioner of Patents, Washington, D. C." stating that he seized Letters Patent No. 718,340, dated Jan. 13, 1903, and "every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government for past infringement thereof" and he required that "you convey, transfer, assign and deliver the same to me, as Alien Property Custodian" (R., ff. 101-103, pp. 77-79).

He further said, therein:

> "I, as Alien Property Custodian do request that the Commissioner of Patents record this requirement upon the books and records kept by him, to show the assignment and transfer of Letters Patent and applications for Letters Patent in respect to said Letters Patent and applications for Letters Patent above mentioned and I further request that the Commissioner of Patents issue any and all Letters Patent which may be granted upon said Letters Patent to me as Alien Property Custodian, my successors in office, or assigns" (R., f. 102, p. 79).

Service of this demand was acknowledged by Messrs. Hauff & Worland on February 11, 1919 and by the Commissioner of Patents, February 20, 1919 (R., f. 103, p. 79).

March 22, 1919. The Alien Property Custodian addressed a similar demand to "E. I. DuPont De Nemours & Co., Wilmington, Del., Roessler & Has-

slacher, 100 William St., New York, N. Y., To the Commissioner of Patents, Washington, D. C., and To all to whom these Presents may Come" seizing Patent No. 680,395 (R., ff. 98-99, pp. 75-76; R., f. 99, p. 76).

Service of the demand was acknowledged by the Acting Commissioner of Patents, March 26, 1919, and the same was recorded on the same day in "Transfer of Patents" Liber K 106, p. 417 (R., f. 100, p. 76).

March 22, 1919. The Alien Property Custodian addressed a similar demand to "E. I. DuPont De Nemours & Co., Wilmington, Del., H. A. Metz Laboratories, Inc., New York, N. Y., To the Commissioner of Patents, Washington, D. C." seizing Patent No. 868,294 (R., ff. 103-104, pp. 79-80; R., ff. 104-105, pp. 80-81).

Service of this demand was acknowledged by the Acting Commissioner of Patents on March 26, 1919, and the same was recorded on the same day, in "Transfer of Patents" Liber Z 106, page 301 (R., f. 105, pp. 80-81).

Assignment of Custodian to Foundation, April 10, 1919.

April 10, 1919. The Alien Property Custodian, for a consideration of $250,000, assigned to the Chemical Foundation, Inc., "the whole right, title and interest acquired" by him, as Alien Property Custodian to Letters Patent Nos. 718,340, 680,395 and 868,294, among others "together with all claims and demands for profits and damages recoverable at law or in equity for the past infringement of said Letters Patent of the United States against every person, firm, corporation or government except the

> government of the United States of America * * * all as more specifically described and set forth in the requirements or demands relating to said Letters Patent * * * without any reservation or qualification whatsoever * * * and subject only to the provisions of a certain release to the United States of America * * * and to the rights of citizens of the United States of America * * * as set forth in the requirements or demands'' (R., ff. 108-111, pp. 83-86).

The Custodian could assign no more than he had seized.

The demands and assignment expressly recognized the right of DuPont to use the patents under license of the Federal Trade Commission upon payment of the license fees to the Custodian for deposit in the Treasury.

Executive Order of February 13, 1920.

February 13, 1920. Almost one year after the first assignment, the President signed an Executive Order in which it was recited that ''doubt has arisen as to the authority of the said Alien Property Custodian to sell and convey to the said The Chemical Foundation, Inc., certain of the said choses in action, rights, interests, benefits under agreements, and rights and claims including rights to receive moneys by way of royalties or otherwise, as compensation for the use of patents, trade-marks or trade names'' (R., f. 116, pp. 89-90).

The President then authorized the Custodian to sell at private sale to the Foundation ''all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description which the Alien Property Custodian may seize or may

have seized under the provisions of the 'Trading with the Enemy Act' and the amendments thereto now or hereafter enacted" (R., f. 117, p. 90).

The Alien Property Custodian was also authorized "in the case of sales heretofore made by him of any property which he is hereby authorized to sell, but as to which his authority to sell the same under the said Orders of February 26, 1919 and April 5, 1919, may be deemed doubtful to confirm and ratify the said sales by the execution and delivery of a suitable instrument of confirmation" (R., f. 117, p. 90).

The President's reasons for the foregoing determination and order were "stated in the said orders of Frank L. Polk on the 26th of February, 1919, and the 5th of April, 1919; and in addition thereto, the public interest will be best served by the elimination of any enemy interest adverse to American citizens arising by reason of said choses in action, or rights, interests and benefits under agreements and by the devoting of any payments made by reason of said choses in action or under said agreements by The Chemical Foundation, Inc., to the promotion of the objects stated in its charter" (R., f. 117, p. 90).

Second Assignment of the Custodian Dated March 1, 1921.

March 1, 1921. Over one year after the President's Executive Order, and two years after the original assignment, the Custodian "for valuable consideration heretofore received" assigned, sold, set over and transferred to the Foundation "all property, including (but not thereby limiting the generality of the foregoing) letters patent, rights under letters patent, applications for letters patent and rights thereunder, copyrights, rights under copy-

rights, certificates of registration thereof, the publications upon which such registrations were granted, trade-marks, rights under trade-marks, together with the good will and business pertaining thereto including all profits and damages recoverable at law or in equity for past infringement with respect to any and all of the foregoing, choses in action, rights, interests, and benefits under agreements, and rights and claims of every character and description with respect to all of the foregoing, seized by me as Alien Property Custodian, or by my predecessor in such office specifically referred to in and assigned by said assignments, and I do hereby confirm and ratify the sale and assignment of and do hereby sell, assign, transfer and set over to said The Chemical Foundation, (Inc.), all choses in action, rights, interests, and benefits under agreements and rights and claims of every character and description growing out of and appurtenant to the ownership of said property, including (but not thereby limiting the generality of the foregoing) rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, copyrights, and trademarks, and all right, title and interest in and to the choses in action and the funds referred to in section 10, subsection (f) of the 'trading with the enemy act,' as amended, acquired by the Alien Property Custodian by virtue of the seizures by which there were seized patents, copyrights, or trade-marks, under which a license had theretofore been granted in accordance with the provisions of section 10, subsection (c) of said act, as amended, all of which property I, as Alien Property Custodian, from time to time have determined and do hereby determine to relate to the objects and pur-

poses of said the Chemical Foundation (Inc.), as expressed and defined in its charter; the intent and purpose of this instrument being to vest in said the Chemical Foundation (Inc.), every right, title, interest, claim and demand, save such as are specifically excepted in and by the said assignments acquired by the Alien Property Custodian by virtue of the seizures whereby the said property was seized" (R., ff. 123-124, pp. 94-95).

No new, or additional demand, was served by the Custodian, on the Commissioner of Patents, or the Treasurer of the United States or any other person.

While the Custodian's original assignment to the Foundation was amplified, in the second assignment, the original demand never served on the Treasurer, was not.

The Congress, in the Amendment of November 4, 1918 provided the method of seizing patents, by serving the Commissioner of Patents, but provided no machinery for seizing the enemy's intangible right granted by Congress for peace-time compensation for use.

Treaty of Peace.

The Treaty of Peace with Germany was signed at Berlin, August 25, 1921; ratification advised by the Senate, October 18, 1921; ratified by the President, October 21, 1921; ratifications exchanged at Berlin, November 11, 1921; proclaimed by the President, November 14, 1921 (42 Stat. 1939, 1943).

Part X, Sec. IV, Article 297 and annex, paragraphs 1 and 3, Treaty of Versailles, were adopted by Article V (1) of the Treaty of Berlin. (*U. S.* v. *Chemical Foundation*, 272 U. S. 1, 12.)

The President's Proclamation of November 14, 1921, declared that the War With Germany terminated on July 2, 1921.

Institution of Suits.

Just prior to July 2, 1922, and therefore within one year after the termination of the War, the petitioners and the Chemical Foundation, each claiming to be the "owner" referred to in subsection (f) of the Trading with the Enemy Act, instituted suit against DuPont for the fixation of a reasonable royalty for the use of the indigo patents aforesaid (R., ff. 1-50, pp. 1-42).

The Chemical Foundation prayed for the fixation of a reasonable royalty only from the time of the Custodian's assignment of the patents to it, that is to say, from April 10, 1919 (R., f. 20, pp. 14-15).

By agreement the suit of the Chemical Foundation and the three suits of petitioners and another German corporation called Farbwerke vormals Meister Lucius & Bruning, were consolidated and heard at the same time, by the District Court of Delaware on April 30, 1928 (R., ff. 53-55, pp. 44-45).

Upon the trial the petitioners limited their prayer to the fixation of a reasonable royalty, only for the period from the date of the original license to DuPont (January 21, 1918) to the date of the Custodian's assignment to the Chemical Foundation (April 10, 1919) (R., f. 177, p. 137).

Decision in Case of U. S. v. Chemical Foundation by This Court.

Between the date of the institution of these suits and the hearing of the same, this Court had decided the case of *U. S.* v. *Chemical Foundation*, (272 U. S. 1), and the Congress had amended Sec. 10, subsection (f) for the first time since its enactment.

The case of *U. S.* v. *Chemical Foundation*, was decided by this Court, October 11, 1926.

Passage of Settlement of War Claims Act.

Section 10, subsection (f) of the Trading with the Enemy Act was amended by Sec. 19 of the Settlement of War Claims Act in effect March 10, 1928 (R., f. 180, pp. 139-140).

This amendment provided that any person who was the owner of patents immediately prior to seizure, who had brought suits to have royalties fixed for licensed use, within the statutory period, should be considered by the Court, as the owner, as that term is used in subsection (f) as to the royalties accruing prior to disposition of the patents by the Custodian (R., f. 180, pp. 139-140).

Proceedings Below at the Trial.

The issues before the District Court were as follows:

The petitioners asked for the fixation of a reasonable royalty for the period prior to April 10, 1919, the date of assignment of the patents to the Foundation (R., ff. 40, 43, 49, pp. 35, 37, 38, 41, 42).

The Foundation asked for the fixation of a reasonable royalty subsequent to this period (R., f. 20, pp. 14-15).

DuPont opposed the fixation of a reasonable royalty as prayed for in the petitioners' bill as limited at the trial to the period above stated (R., f. 51, p. 43).

The Attorney General opposed the fixation of a reasonable royalty for the period subsequent to sale as prayed for by the Chemical Foundation (R., f. 56, p. 46).

The Attorney General also requested substitution of the Custodian for the petitioners (R., ff. 66-69, 76-79, 87-90, pp. 53-55, 60-62, 67-69).

There was no controversy before the Court as to the fact that the petitioners were the owners of the patents involved in this litigation at the time of the seizure

of the same by the Alien Property Custodian, and that the petitioners had brought suit within one year after the end of the war.

The defendant DuPont moved to dismiss the petitioners' complaints on the ground that they were not the owners of the patents (R., ff. 62, 72, 83, pp. 50, 57, 64).

The Treasurer of the United States moved to dismiss the complaints of the Foundation (R., f. 56, p. 46).

The District Court, by order, denied the motion of the Custodian to be substituted, as plaintiff, for the petitioners (R., ff. 194-195, 197-198, 200-201, pp. 151-152, 153-154, 155-156).

The District Court, by order, also denied the motion of the Treasurer to dismiss the complaint of the Foundation (R., f. 190, p. 148).

The District Court, by decree, granted the motion of DuPont to dismiss the petitioners' bills of complaint (R., ff. 196, 198, 201, pp. 152, 154, 156).

The District Court decreed judgment for the Foundation as follows:

> "First: That the plaintiff became on April 10, 1919, and has ever since been and is now the sole owner of the Letters Patent of the United States Nos. 680395, 868294 and 718340 and of the inventions and discoveries covered thereby and of every right, title and interest therein, including in particular the right inuring to the 'owner' of said Letters Patent, under and by virtue of Section 10-f as originally enacted of the Act of Congress known as the Trading with the Enemy Act, to sue and recover for the use and enjoyment of the inventions and discoveries covered by said Letters Patent by any person or persons licensed under other provisions of said Act to use and enjoy the same.
>
> Second: That the right of recovery so belonging to the plaintiff embraces the right to recovery

for all use and enjoyment of the inventions and discoveries covered by said Letters Patent by every and all such person or persons so licensed, without regard to whether or not such use and enjoyment was wholly or in part before or after said April 10, 1919, and is unaffected by the amendment of said Section 10-f of said Act by Section 19 of the Act of Congress known as the Settlemenet of War Claims Act of 1928, or by any other amendment of said Trading with the Enemy Act.

THIRD: That the plaintiff is entitled to recover from the defendant E. I. duPont de Nemours and Company a reasonable royalty for all use and enjoyment by said defendant of the inventions and discoveries covered by said Letters Patent under Federal Trade Commission License No. 19 dated January 21, 1918, and under said License as amended by order of said Commission dated January 14, 1920; and

FOURTH: That the plaintiff having in its bill of complaint limited its claim to such recovery to all such use and enjoyment for the period from on and after April 10, 1919, do recover from the defendant E. I. du Pont de Nemours and Company a reasonable royalty for all use and enjoyment of the inventions and discoveries covered by said Letters Patent by said defendant E. I. du Pont de Nemours and Company pursuant to said License and to said License as amended for the period from on and after April 10, 1919, with interest thereon, the account to be taken and stated and such reasonable royalty ascertained by proceedings appropriate for such purpose; and

FIFTH: That upon the taking and stating of said account and the ascertainment of said reasonable royalty and after consideration thereof by this Court the plaintiff shall have a final decree herein against the defendant E. I. du Pont de Nemours and Company for the amount of such

reasonable royalty for the use and enjoyment of the inventions and discoveries covered by said Letters Patent by said E. I. du Pont de Nemours and Company for the period from on and after April 10, 1919, as this Court shall thereby determine, with interest thereon, and costs to be taxed by the Clerk, and that said final decree shall further provide that the defendant the Treasurer of the United States forthwith pay over to the plaintiff the fund deposited with him by the Alien Property Custodian representing payments by the defendant E. I. du Pont de Nemours and Company, pursuant to the terms of said License and of said License as amended, for and on account of its use and enjoyment under said License and said License as amended of the inventions and discoveries covered by said Letters Patent, together with all income from said fund and increment thereof to the extent that said fund and the income and increment thereof do not exceed the amount of said reasonable royalty, interest and costs theretofore by said final decree directed to be paid to the plaintiff by said defendant E. I. du Pont de Nemours and Company for its said use and enjoyment of the inventions and discoveries covered by said letters patent for the period from on and after April 10, 1919, such payment when received by the plaintiff to be applied by it as a payment by said defendant E. I. du Pont de Nemours and Company on account of the amount so directed to be paid by said defendant to the plaintiff by said final decree" (R., ff. 191-194, pp. 149-151).

Appeals.

Petitioners, the Treasurer and the Alien Property Custodian petitioned for leave to appeal and the petitions were granted (R., ff. 203-206; 217-219; 228-229; 235-236, pp. 157-159, 165-166, 171-172, 174-175).

Assignments of Errors appear in the record at folios 207-217; 220-228; 230-235; 237-242; pp. 159-165, 167-171,

172-175, 176-178). Stipulation as to transcript of record appears at folios 243-248, pp. 178-181.

The Circuit Court of Appeals, Third Circuit, affirmed the orders and decrees of the District Court (R., ff. 250-267, pp. 181-200).

Summary of Argument.

1. The Congress at no time authorized the seizure or disposition of the enemy patent owners' right to compensation for use of captured patent rights.

2. The right to compensation for captured patent property rights was never seized by the Alien Property Custodian.

3. The Congress, in 1917, authorized compensation, after the war, to enemy patent owners and reaffirmed this right in the former enemy owners in Sec. 19 of the Settlement of War Claims Act of 1928.

4. The decrees and orders of the District Court, affirmed by the Circuit Court of Appeals, Third Circuit, are not in accord with the supreme law of the land as expressed in Sec. 10 (f) of the Trading with the Enemy Act as amended by Sec. 19 of the Settlement of War Claims Act of 1928.

5. Sec. 19 of the Settlement of War Claims Act of 1928, amending subs. (f) Sec. 10 of the Trading with the Enemy Act, is a valid exercise by Congress of its legislative powers.

6. Sec. 19, as aforesaid, is part of the supreme law of the land, binding on the District Court and the Circuit Court of Appeals.

7. Sec. 19, as aforesaid, deprives neither DuPont nor the Chemical Foundation of property, money or vested rights ever possesesed by either.

ARGUMENT.

I.

The decrees and orders of the District Court, affirmed by the Circuit Court of Appeals, Third Circuit, are not in accord with the supreme law of the land as expressed in Sec. 10 (f) of the Trading with the Enemy Act as amended by Sec. 19 of the Settlement of War Claims Act of 1928.

The decrees of the District Court, affirmed by orders of the Circuit Court of Appeals, that the Foundation is the sole owner of the right to sue and recover for the use and enjoyment of certain enemy inventions, by Presidential licensees and is entitled to recover for all use and enjoyment both before and after April 10, 1919 (the date of assignment of the patents by the Custodian to the Foundation) are contrary to law and to the facts applicable to the case (Decree in full at R., ff. 191-194, pp. 149-151; *supra*, pp. 23-25).

The foregoing Judicial determination is squarely in conflict with the legislative provisions of Section 19 of the Settlement of War Claims Act of 1928.

This statute provided that the enemy owner, immediately prior to seizure, should be considered by the Court, as the owner of the patent, within the terms of Sec. 10 of the Trading with the Enemy Act in any suit brought within the statutory period, to recover reasonable value for the use and enjoyment of the patented invention under Presidential license (Text, *supra*).

We consider hereinafter the effect upon alien patentees of the passage of the original Trading with the Enemy Act; the various amendments thereto and of the acts of the Executive Department in connection therewith culminating in the decrees under consideration.

Pre War Status of Alien Patentees.

Peace-time "patent rights" were the creation of the law makers.

The legislature's power to create was derived from the Constitution (Art. I, Sec. 8, Cl. 8).

The authorization of the latter document was to "promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries" (*ibid.*).

Patents contained "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use and vend, the invention or discovery throughout the United States and the territories thereof" (R. S., Sec. 4884). They might be obtained by aliens.

Patent rights, as between citizen and citizen and citizen and alien, might be transferred only in accordance with laws regulating such transfers (*Jewett* v. *Atwood Suspender Co.*, 100 Fed. 647).

The whole patent, comprising the exclusive right to make, use and vend might be transferred by written assignment (*Waterman* v. *MacKenzie*, 138 U. S. 252).

An undivided part or share of that exclusive right might be similarly transferred (*ibid.*).

The exclusive right to make, use and vend throughout a specified part of the United States might be, in like manner, transferred. (*ibid; U. S.* v. *General Electric Co.*, 272 U. S. 476.)

Transfer of the entire exclusive right or of the exclusive right, in a specified part of the United States, permitted the assignee to sue for infringement in his own name. Transfer of an undivided part of the exclusive right permitted suit only in the name of assignor and assignee, jointly (*ibid.*).

Any assignment or transfer, short of one of the foregoing, was a mere license, giving the licensee no title in the patents and no right to sue at law in his own name for an infringement. (*Gaylor* v. *Wilder*, 10 How. 477; *Moore* v. *Marsh*, 7 Wall. 515; *Waterman* v. *Mackenzie*, *supra*.)

The entire and unqualified monopoly, in specified territory, or an undivided interest in the monopoly, must be conveyed, else the assignment was a mere license (*Gaylor* v. *Wilder*, *supra*).

When the transfer amounted to a license only, title remained in the owner of the patent (*Waterman* v. *Mackenzie*, *supra*).

Whether a transfer was an assignment or a license did not depend upon the designation of the instrument, but upon its legal effect (*ibid.*).

The statute secured to the inventor the exclusive right to make, use and vend the thing patented and consequently prevented others from exercising like privileges without the consent of the patentee (*Bauer* v. *O'Donnell*, 229 U. S. 1).

Even the Government had no more right than a private person to use a patented invention without license of the patentee or making compensation to him (*Belknap* v. *Schild*, 161 U. S. 10).

Congress, by the Act of June 25, 1910, c. 423, provided a method by which a patentee may recover reasonable compensation for use by the United States, where such use was without license by the patentee. This Court held that such Congressional enactment did not give the United States a general license to use the inventions

disclosed by patents. (*Cramp & Sons* v. *Curtis Turbine Co.*, 246 U. S. 28; *Richmond Screw Anchor Co.* v. *U. S.*, 275 U. S. 331.)

Rights secured under the grant of letters patent by the United States were property and protected by the guarantee of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation (*ibid*).

Congressional Capture of Enemy Patent Rights.

The Sovereign People of the United States of America in the Trading with the Enemy Act, approved October 6, 1917, enunciated their policy as to patents owned by German nationals (Statute, *supra*).

Citizens were forbidden to have intercourse or commerce with the subjects of the power with which America was then at war. These subjects were declared to be "enemies." They could not, directly or indirectly, make, use or vend their inventions in the United States. No citizen could negotiate for or accept transfer of the right to make, use and vend (*ibid*).

Statutory "enemies" were the legal owners by legislative permission, at that time, of certain "patent rights." These rights included the exclusive authority to make, use and sell certain inventions; to permit others to do so and to invoke the aid of the courts to prevent unauthorized persons from so doing.

These "rights" have no actual physical existence. They were figments of the legalistic imagination.

They were intangible, impalpable, incorporeal.

The legislative power which created them by enactment, appropriated part thereof by enactment.

The peace-time right to use, carrying with it the right to permit others to use, granted by the Sovereign People, could not be exercised in war time, by the grantee.

The Sovereign People took over this exercise. This was a capture of an abstraction; the conquest of a fiction; the appropriation of a mental concept.

The People authorized their President to permit Americans to make, use and vend the enemies' patented invention (Statute, *supra*). This was the exclusive peace-time function of the patentees.

The "right" was left in the enemy to resort to the Court, by representative, to prosecute non-licensees.

The American Constitution permits no taking of private property without just compensation (Fifth Amendment).

Patent rights are property in juristic contemplation.

The American People did not appropriate the right to use the enemy inventions exclusively for Government purposes in the sole interests of the whole People, in the prosecution of the war.

Without restriction, under the war legislation, the inventions might be devoted to money making purposes by American commercial licensees.

In the contemplation of legal and economic theorists this was devotion in war time and thereafter, of an enemy person's property to the benefit of citizens, accomplished by the intervention of sovereignty.

The Congress provided that users should pay.

Administrative functionaries were directed to issue permits to use, to collect the avails of use, and to hold the same, secure, in the Federal Treasury, until after the close of hostilities (Statute, *supra*).

To the Judiciary, when Peace had dispelled the animosities of War, was entrusted the task of determining and fixing in terms of money the *quantum* of the value of American citizens' "use and enjoyment" of the patents. The funds paid into the Treasury by licensees were available for the satisfaction of such award (*ibid*).

Excess, if any, was to be returned to the American. Judgment over might be ordered, if the fund was insufficient. The American user, on terms, might be permitted to continue his use, or the Judiciary was empowered to terminate the same (*ibid*).

The Presidential permit was an absolute defense to the American licensee, against any suit of the enemy, after the war, except to recover compensation. All other defenses in such suit might be interposed by the American user (*ibid*).

The Congress provided *post bellum* relief and redress, in terms of money, for the deprivation of the benefits of the statutory grant of exclusive, monopolistic patent property rights.

If the taking was sovereign capture, condemnation, appropriation by eminent domain, sequestration, subrogation, benevolent trusteeship, or otherwise, the post bellum remedies were in the nature of compensation.

The legislative body authorized to make the appropriate regulations for such affairs so ordained.

The funds collected under Presidential license, for use were designated in the statute "trust funds" for the owner and the licensee (Statute, *supra*). They belonged neither to the enemy nor to the licensee. Title was in the People.

The enemy owner was permitted, after the war, to seek, by suit against Treasurer and licensee, possession of all, or some of these funds as compensation for the action of the People's legislative representatives. The Judiciary was merely the instrument to ascertain the *quantum* of the compensation. The fact that the "claim" should, by Congressional direction, take the form of a suit against the licensee, with the Treasurer as a party, did not change the nature of the claim. The Treasurer was a necessary party and the Custodian was entitled to notice. Suit against the licensee was appropriate so

that payment, for use, for the life of the patent, extending beyond the period of hostilities, might be obtained or the license cancelled. But the suit was to recover for use and enjoyment occasioned by sovereign action in derogation of peace time rights.

The explicit legislative intent was, to provide money payment to the owner on October 6, 1917, of the patent rights; to compensate such owner for the Congressional deviation in war time from the peace time laws under which the patentee had submitted his invention to the scrutiny of American officials, to obtain the issuance of "letters patent."

The peace time law was a pact and a covenant between the People and the alien (*Jewell Filter Co.* v. *Jackson*, 140 Fed. 340, 343; *Krupp* v. *Midvale Steel Co.*, 191 Fed. 588, 594; *Railroad Supply Co.* v. *Hart Steel Co.*, 222 Fed. 261-274).

Its war time abandonment necessitated indemnification, this being the traditional *amende honorable* of sovereignties.

This assurance of indemnification was not a right absolute; a chose in action or a chose in possession. It was a gesture of sovereign magnanimity. It was personal to the patentee; non transferrable; non seizable by other servants of the People and non dedicable by such servants to private interests. The control and disposition thereof was in the Legislative Hand of the Body of the People. Not in the Executive Hand. And not in the Judicial Conscience of the People.

The foregoing sets out the plan of Congress as to the capture of the use of enemy patent rights; the licensing of such use to American nationals and the compensation for such use to be adjusted by the Judiciary, as to *quantum*, after hostilities ended.

Status of Enemy Patentees After Passage of the Trading With the Enemy Act.

The Trading with the Enemy Act, changing the alien patentee's status to "enemy" apparently superseded all of the patent laws applicable to his peace time status. Else there would be an irreconcilable conflict between the peace statute and the war law. *Salus reipublicae suprema lex.*

The enemy patentee's peace time right to exclude all others from the use of his inventions was appropriated by the People of the United States. The patentee's exclusive right to license others to use his inventions was also appropriated. Exercise of this war power is an act of sovereignty. 13 Am. L. Reg. 265, 337, 401.

The enemy's naked title, in the Patent Office; and his right to sue non licensees for infringement, remained. Nothing else.

Effect of the Amendments of March 28, 1918 and November 4, 1918.

On March 28, 1918, the Trading with the Enemy Act was amended to permit the Custodian to manage property, *other than money*, delivered to him as though he were the absolute owner thereof. Disposition of such property, *except money*, by sale was included in the new powers (Text, *supra*).

On November 4, 1918, an additional amendment to the Trading with the Enemy Act became effective, authorizing the seizure of patents and patent rights (Text, *supra*).

The two statutes authorized the Custodian to seize and dispose of enemy patent property and rights, *except money*, as if he were the absolute owner thereof.

The provisions of Sec. 10 (*f*) were not specifically repealed by either amendment.

As no presumption of repeal of statutes, by implication, may be indulged in, it must be considered that Sec. 10, subs. (f), giving the enemy, contingently, post bellum right to compensation for his appropriated property, was not affected by either the March or November, 1918 amendment, and that no mandate to the Custodian to seize the enemy's contingent right to post bellum compensation was authorized by the Congress (*U. S.* v. *Noce*, 268 U. S. 619).

Shortly after the November amendment, the Custodian seized the patents with which this case is concerned (Text of Seizures, *supra*).

We now consider the effect of these seizures.

The question arises, *in limine*, as to (1) what the Custodian was authorized to seize; (2) what he did seize, and (3) what, if anything, was not susceptible of seizure and (4) what was not seized.

(1) What the Custodian was Authorized to Seize.

As to (1), the Congress authorized in the November 4, 1918 amendment, the seizure of "patents," "choses in action," and "rights and claims of every character and description," owing, belonging to or held for an enemy. The context of the Act as amended shows, conclusively, that "rights" referred to such rights as the patentee, *qua* patentee, might possess (Text, *supra*).

As Section 10 remained, unaffected, the intention of Congress to preserve the right of compensation is further apparent.

The amendment of November 4, 1918 provided for the filing, registering or recording of the requirement or demand, made by the Custodian pursuant to the Act, "in any office for the filing, registering or recording of conveyances, transfers of assignments of any 'such property or rights as may be covered by such require-

ment," including the office for registering assignments of patents "or any rights therein or any other rights" (Text, *supra*).

On February 26, 1918, the President, by Executive Order, provided for the service of demand upon the person performing any duty concerning enemy money or exercising any right, power or authority thereover, or upon the person holding any enemy right.*

The same order defined "right", "title" "interest" respectively, to be such right, title and interest of the enemy *"as may actually exist"*, and also "such as might or would exist if the existing state of war had not occurred" (R., f. 134, p. 103).

This order also provided that "a demand for the conveyance, transfer, assignment, delivery and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover".

The President possesses no legislative power. He was empowered by the Trading with the Enemy Act to make appropriate rules and regulations. This provision in the Executive Order was ineffective to author-

*The provision, in full, is as follows:

"Notice of any demand made by the Alien Property Custodian may be given to any person, who alone, or jointly with others, may hold or have the custody or control of or may be exercising any right, power or authority in or over or may be performing any duty concerning the money or other property mentioned in the demand; and, in any notice given, the Alien Property Custodian may require of the person notified the performance of any act or thing within the power of the person notified which may be necessary or proper to make the demand fully effective, or to establish proper acknowledgment, recognition or evidence of the right, title, interest and estate of the Alien Property Custodian in and to such money or other property and of the power and authority of the Alien Property Custodian thereover, and it shall be the duty of any person so notified to perform any act or thing so required. Such notice may be given in person or by mail." (R., f. 137, pp. 104-105.)

ize the acquisition of the enemy's right to compensation for the capture of his property.

The foregoing statute and Executive Orders show, positively, that the Custodian was authorized to seize patents and patent rights, actually existing, or which would have existed had no war intervened.

(2) What the Custodian Did Seize.

As to (2), the Custodian by serving his requirement or demand upon the Commissioner of Patents, seized "the letters patent and every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government for past infringement" (R., f. 104, p. 80).

This requirement or demand, under the statute, when recorded in the Patent Office, operated as a conveyance, transfer and assignmenet to the Alien Property Custodian of the patents and every "right, title and interest with respect thereto" incident to patent ownership as evidenced by the records of the Patent Office and as set out in the demand (Statute, *supra*).

All the enemy had left, as patentee, at that time was the record title to the patents, encumbered with the captured use effected by the sovereign in the terms of the original Trading with the Enemy Act; and the statutory right to sue non licensees.

The service of the requirement or demand upon the Commissioner of Patents and the recording of the same, vested in the Custodian the remaining rights of the enemy, as patentee, not previously captured, as above set out, but nothing else in addition thereto. It did not vest in the Custodian the right to cancel the Federal Trade Commission's licenses or to take over that body's licensing power. The President continued this power (Executive Order, R., f. 157, p. 122).

The captured rights were those actually existing and which would have existed had there been no war. In other words, peace time rights.

(3) What, if Anything, Was Not Susceptible of Seizure.

As to (3), the question arises as to whether the Custodian's service, upon the Commissioner of Patents, vested the Custodian with the post bellum privilege granted by the Sovereign's legislative favor, in the Trading with the Enemy Act to the patentee to recover compensation, in peace times, for the captured use, in war time, of his private property.

This right to compensation arose *after*, or concomitantly with capture. It was inchoate and contingent. It existed in the conscience of the Sovereign. The Act was a visible manifestation of the Sovereign will. The Sovereign intention was revocable at pleasure. No vested property right was created. Nothing could be done until after the war. No Americans, during the war, could take the right by assignment from the enemy. No official in America held the right, had custody or control of it or exercised any power or authority over it or performed any duty concerning it or had any evidence of it (Ex. Order, February 26, 1918, *supra*). No office, in America, existed in which a conveyance, assignment or transfer of the right could be filed, registered or recorded, or in which evidence of the capture or cancellation of the right could be entered (Statute, *supra*). Neither Executive nor Judiciary could divest the enemy of the compensatory right for war time penalties, granted by the Legislature.

No express language of the statute provided for its seizure. No machinery for its seizure was set up.

The *res* which was the subject of the *jus* was in the hands of the Treasurer of the People of the United States. The American right to benefit under the captured use was evidenced by the records of the Federal Trade Commission, the delegate of the Presidential licensing power.

No demand was served upon either the Treasurer or the Federal Trade Commission.

It seems clear, therefore, that the intangible right to compensation was not susceptible of seizure, by officials of the Executive Department by service of demand upon the Commissioner of Patents or otherwise. It is equally clear that the Congress did not contemplate or authorize its seizure. What Congress contingently gave the enemy, *in futuro,* Congress could, but did not, take away, expressly or by implication.

(4) What Was Not Seized.

There can be no possible controversy about the fact that license fee *moneys* in the hands of the Treasurer were not seized by the Custodian.

It is equally certain that the Custodian's requirement or demand did not specifically, or by implication, designate the right of the enemy to contingently recover post bellum compensation for the war time use of his patent property, as seized, and thereby extinguished.

The demand did include the right to sue for past infringement.

The right of licensed American users was unaffected.

American licensees paying their money into the Treasury possessed the contingent right of return if the enemy owner did not sue. The demand was silent as to these payments. There was no seizure of the licensee's right. There could be none.

The People already possessed licensing power. This right also was unaffected by seizure.

It is beyond question, therefore, that the Custodian did not seize, and was not authorized by the Congress to seize, either the license fee moneys in the Treasury, or the right to post bellum compensation granted in Sec. 10 (f) and unrepealed by the November 4, 1918 amendment, or any other.

The Custodian Possessed No Statutory Power to Dispose of Captured Money.

No power over the disposition of license fees is given the President or the Custodian in the Act, as originally enacted, except to order the Treasurer, *after the war,* to repay the same to Americans, if the enemy patent owner did not sue for compensation.

No power was given the Custodian by the amendment of March 28, 1918, to exercise any right or power "as though he were the absolute owner" over *money* paid into the Treasury.

No power to "make any disposition" by sale, or otherwise, of *money* was given him.

"Money" was expressly excepted from the scope of his dispositive powers, original and supplementary.

There is no difference whatsoever between money, as that term is used in the Act, and the right to sue to obtain fixation of the *quantum* of the same. Each, in the contemplation of Congress, was "just compensation," in part, as that term was used in the Constitution.

The license fee payments are not, and never have been enemy moneys. They were paid by Americans. Americans had the legislative assurance of return if no enemy suit was brought after the peace. They were designated as "trust funds."

The President in his Executive Order of February 28, 1918 directed that moneys paid into the Treasury "shall be credited by the Treasurer of the United States to the

Secretary of the Treasury for account of the Alien Property Custodian" (R., f. 142, p. 110).

Public money is money coming into the hands of a public officer by virtue of his office (*Smith* v. *U. S.*, 170 U. S. 372).

Any moneys in the Treasury may be paid out in accordance with an "appropriation" by the Congress (Constitution, Art. I, Sec. 9, Cl. 7). This appropriation was made in the original Trading with the Enemy Act and in Sec. 19 of the Settlement of War Claims Act of 1928, for the enemy's peace time benefit. The enemy could be divested of these rights only by Congressional enactment.

The absence of any Congressional authorization to seize or divest is shown by the amendment, in 1928, of the Act of 1917.

The absence of authority in any officer of the Government between 1917 and 1928, to divest the enemy of this right, is also shown by the 1928 amendment.

No intervening Executive Department action or adjudication of the Judiciary, is superior to the intent of Congress, as shown by the Trading with the Enemy Act as amended by Sec. 19 of the Settlement of War Claims Act of 1928.

From the foregoing, it is clear, beyond contradiction, that the Custodian had no authority to and did not seize the enemy's right to post bellum compensation money. This right was the gift of Congress, revocable at will, but inalienable by any authority except that of Congress, clearly expressed.

We now consider what the Custodian originally assigned to the Foundation.

Assignment of Custodian to Foundation, April 10, 1919.

The Alien Property Custodian, April 10, 1919, for a consideration of $250,000, assigned to the Chemical

Foundation, Inc., "the whole right, title and interest *acquired*" by him, as Alien Property Custodian, to letters patent Nos. 718,340, 680,395 and 868,294, among others, "together with all claims and demands for profits and damages recoverable at law or in equity for the past infringement of said letters patent of the United States against every person, firm, corporation or government except the Government of the United States of America * * * *all as more specifically described and set forth in the requirements or demands relating to said letters patent* * * * without any reservation or qualification whatsoever * * * and subject only to the provisions of a certain release to the United States of America * * * and to the rights of citizens of the United States * * * as set forth in the requirements or demands" (R., ff. 108-111, pp. 83-84).

The Custodian could assign to the Foundation no more than he seized.

The assignment was in the same language as the demand.

Measured by the authorities quoted hereinabove, and in view of the previous capture of use, the Custodian's assignment to the Foundation was a mere license, together with the right to sue for past infringement.

The assignment did not convey the exclusive right or an undivided part thereof to make, use and vend, generally or in a specified territory. That exclusive right was destroyed when the People's Congress passed the Trading with the Enemy Act.

The Foundation could not enjoin Federal Trade Commission licensees from using; could not enjoin them from continuing their payments to the Custodian; could not prosecute them for infringement after the receipt of licenses. The Foundation shared with the President's delegate, the Federal Trade Commission, the

licensing power. The Foundation, therefore, was a mere licensee, no matter what the document of assignment was designated (*Waterman* v. *Mackenzie, supra*).

No cessation of royalty payments by Presidential licensees occurred. No Federal Trade Commission licenses were revoked. No claim was asserted by the Foundation against the moneys in the Treasury. No demand under Sec. 9 of the Act was filed by the Custodian or by the Foundation as owner of the funds held by the Treasurer, or of the right thereto. The Custodian did not cease to receive license fee payments and pay them into the Treasury and did not direct licensees to surrender their licenses and take out new ones from the Foundation. The Custodian was, at the same time, President of the Foundation. No record was made in any Government, or other, office of the transfer of the enemy's right to compensation to the Foundation, or of his right to sue.

On December 3, 1918, the President, by Executive Order, restricted the Federal Trade Commission's previous authority to license, under Sec. 10 (f) to patents *not* seized by the Custodian (R., f. 158, p. 122). He restored the power in his Executive Order of November 25, 1919 as of July 14, 1919 (R., f. 160, p. 124).

Executive Order of February 13, 1920.

Almost one year after the first assignment, the President, on February 13, 1920, signed an Executive Order in which it was recited that "doubt has arisen as to the authority of the said Alien Property Custodian to sell and convey to "The Chemical Foundation, Inc., certain of the said choses in action, rights, interests, benefits under agreements, and rights and claims including *rights to receive moneys by way of royalties or other-*

wise, as compensation for the use of patents, trade marks or trade names" (R., ff. 115-118, pp. 88-90).

The President then authorized the Custodian to sell at private sale to the Foundation, "all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description *which the Alien Property Custodian may seize or may have seized* under the provisions of the 'Trading with the Enemy Act' and the amendments thereto now or hereafter enacted."

The Alien Property Custodian was also authorized "in the case of sales heretofore made by him of any property which he is hereby authorized to sell, but as to which his authority to sell the same under the said orders of February 26, 1919 and April 5, 1919, may be deemed doubtful, to confirm and ratify the said sales by the execution and delivery of a suitable instrument of confirmation."

The President's reason for the foregoing determination and order were "stated in the said orders of Frank L. Polk on the 26th of February, 1919, and the 5th of April, 1919; and in addition thereto, the public interest will be best served by the elimination of any enemy interest adverse to American citizens arising by reason of said choses in action, or rights, interests and benefits under agreements and by the devoting of any payments made by reason of said choses in action or under said agreements by the Chemical Foundation, Inc., to the promotion of the objects stated in its charter." This Executive Order in terms, specifically referred to "rights" which the "Alien Property Custodian *may seize or may have seized*" (R., ff. 116, 119, pp. 89, 90).

This Order operated, merely, on whatever the Custodian had, or might, seize. He had not seized the right to compensation.

Second Assignment of the Custodian Dated March 1, 1921.

Over one year after the President's Executive Order and on March 1, 1921, and two years after the original assignment, the Custodian, "for valuable consideration heretofore received" assigned, sold, set over and transferred to the Foundation "all property including (but not thereby limiting the generality of the foregoing) letters patent, rights under letters patent, applications for letters patent and rights thereunder * * * including all profits and damages recoverable at law or in equity for past infringement with respect to any and all of the foregoing, choses in action, rights, interests, and benefits under agreements, and rights and claims of every character and description with respect to all of the foregoing, *seized by me as Alien Property Custodian, or by my predecessor in office specifically referred to in and assigned by said assignment*, and I do hereby confirm and ratify the sale and assignment of and do hereby sell, assign, transfer and set over to said The Chemical Foundation (Inc.), all choses in action, rights, interests, and benefits under agreements and rights and claims of every character and description growing out of and appurtenant to the ownership of said property including (but not thereby limiting the generality of the foregoing) *rights to receive moneys by way of royalties or otherwise as compensation for the use of patents * * * and all rights, title and interest in and to the choses in action and the funds* referred to in Sec. 10, Subs. (f) of the 'Trading with the Enemy Act,' as amended, *acquired by the Alien Property Custodian by virtue of the seizures* by which they were seized patents, * * * under which a license had theretofore been granted in accordance with the provisions of Sec. 10, subsection (c) of

the Act as amended, all of which property, I, as Alien Property Custodian, from time to time have determined and do hereby determine to relate to the objects and purposes of said The Chemical Foundation (Inc), as expressed and defined in its charter; the intent and purpose of this instrument being to vest in said The Chemical Foundation (Inc.) every right, title, interest, claim and demand, save such as are specifically excepted in and by the said assignments, *acquired by the Alien Property Custodian by virtue of the seizures whereby the said property was seized*" (Italics ours, R., ff. 118-125, pp. 90-96).

No specific authority to the Custodian to transfer "all right, title and interest" in the "funds" in the hands of the Treasurer, appears in the President's Executive Order. No authority in the President to give any such authorization appears in the statutes.

No new, or additional demand, was served by the Custodian, on the Commisioner of Patents, or the Treasurer of the United States, or any other person, after the execution of either of the foregoing documents.

While the Custodian's original assignment to the Foundation was amplified, in the second assignment, the original demand, never served on the Treasurer, was not.

The President's Executive Order and the Custodian's second assignment in no way enlarged the Custodian's original seizure or his original conveyance, nor did either legally effect a conveyance to the Foundation of the ownership of or the right to recover public moneys, or peace time rights of compensation for captured property.

The original seizure was of "every right, title and interest with respect to" the patents. The original assignment was in the terms of the original seizure.

The Executive Order of the President authorized ratification and confirmation of the Custodian's assignment of whatever he had seized or might seize.

The Custodian's second assignment was of whatever he had seized. He amplified the description of the rights, titles and interests which he claimed he had seized, by specification of the right to receive compensation for use.

This leaves the question as it was in the beginning. Did the Congress authorize the seizure of this right and was it seized and conveyed?

No cessation of Presidential licensing activities through the Federal Trade Commission or the Custodian appears in the record No cessation of collections by the Custodian of license fees paid under Federal Trade Commission licenses appears in the record.

If the President's and the Custodian's intention was to substitute for Government licensors, the new citizen owner, this intention is nowhere apparent in existing records.

The intention *of the Custodian* is shown, in terms, in the second assignment.

It is to give the citizen assignee the right to obtain the license fee moneys, after the war, by suit.

But, so far as the record shows, the Custodian was alone in this intent.

The assignments either passed this right which represents the authority to acquire the avails of use permitted by Sovereign interference with granted monopolistic rights, or they do not.

In peace times, measured by laws relating to claims and assignments of patents they would not pass these rights. Else friendly aliens would not enjoy the equal protection of the laws.

It must be held that Congress first, by enactment, took over participation in the right to license and then by

authorization to the Executive Department, took over the right to the proceeds of license.

Taking over the right to license was equivalent to taking over the exclusive right.

The enemy could not license during hostilities.

Yet the Custodian did not transfer the exclusive right to license. The right to license remained in the President so long as Sec. 10 (f) was unrepealed. The President never assigned this right to the Foundation. And he never authorized the Custodian to assign it.

Claims Against the United States.

The enemy's right to compensation was a claim not only against the Presidential licensee, but also against the fund in the Treasury and consequently against the United States. As such it was assignable only in accordance with the Statute,* unless it be considered that the Trading with the Enemy Act as amended to and including November 4, 1918, superseded, as to enemy aliens, all peace time statutes relating to assignments of claims as well as peacetime laws relating to patents.

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*Statute in full:

"All transfers and assignments made of any claim upon the United States or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, except as provided in Section 204 of this title, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post office quarters made by postmasters to duly authorized agents of the lessors." (R. S., Sec. 3477; May 27, 1908, c. 206, 35 Stat. 411.)

The post bellum right to compensation was not assignable during the war by the enemy, to any American citizen (Sec. 2, Trading with the Enemy Act).

No officer of the Government can do any act which will take assignments out of the statute (*Hitchcock* v. *United States*, 164 U. S. 227).

The statute has been held to include all specific assignments, in whatever form, of any claim against the United States under a statute or treaty, whether to be presented to one of the executive departments or to be prosecuted in the Court of Claims, and to make every such assignment void unless it has been assented to by the United States. *Ball* v. *Halsell* (Tex. 1898), 161 U. S. 72, 16 S. Ct. 554, 40 L. Ed. 622; *Lopez* v. *U. S.* (1889) 24 Ct. Cl. 84; *Brothers* v. *U. S.* (1917) 52 Ct. Cl. 462, aff'd. (1919) 39 S. Ct. 426, 250 U. S. 88, 63 L. Ed. 859.

The Government speaks and acts only through its officers and agents, and a person dealing with the Government, through such officers, must, at his peril, see that the officers had authority to bind the Government. The authority of such officers must be found in either Constitution or statutory law. (*The Floyd Acceptances*, 74 U. S. [7 Wall.] 666, 676; *U. S.* v. *Alexander*, 110 U. S. 325, 329; *Ex Parte Milligan*, 71 U. S. [4 Wall] 1-133).

Captures, in war, inure to the government and become private property only by its grant. Rights of citizens thereto, "must be derived from acts of Congress and *their scope is not to be enlarged in his favor by construction.*" (*United States* v. *Dewey*, [Manila Prize Cases] 188 U. S. 254).

No one can have any right or interest in any capture except by the grant and permission of the United States (*Officers, etc.* v. *United States* [The Siren] 13 Wall 389; *U. S.* v. *Jonas*, 86 U. S. [19 Wall.] 598).

In the matter of disposition of property captured, the Custodian acting as if he were the owner thereof, we

take it, was not immune from the general laws relating to claims, patents, transfers and assignments, assuming the same not to be in conflict with the provisions of the Trading with the Enemy Act as amended.

Intent of Congress.

That the Congress, at no time, contemplated, or authorized, the seizure or disposition by the Custodian of license fee funds, in the Treasury, or the enemy right thereto, or the enemy's right to compensation for the taking of private property, is further shown by the report to the Senate of its Committee on Finance, submitting the Settlement of War Claims Bill, as follows:

> "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation. The amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner,' and in the so-called *Chemical Foundation* case decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be open to the construction that the seizure of property under the authority of the trading with the enemy act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.
>
> It is to be noted, however, that even if the property should be held to have been confiscated

(under the dictum of this decision), *in spite of the clear intent of Congress to the contrary*, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the original owner but declare it to be held for the benefit of and for ultimate return to the original owner. This is apparently just what Congress did under the terms of the Winslow Act in providing that $10,000 of the principal shall be returned to each individual owner, and that thereafter the earnings or interest on the property remaining in the hands of the Alien Property Custodian shall be paid to the owner annually up to the sum of $10,000. So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the *Chemical Foundation* case, *Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation.* (Italics ours) (pp. 12, 13).

* * * * * * *

Of course the Committee is in unanimous accord with the proposition that private property of enemy nationals may not be confiscated, and will not be confiscated, by the United States for the payment of the debts of the enemy government. The United States has always recognized and doubtless always will recognize the sanctity of private property. Despite our recently reaffirmed power to confiscate private property of an enemy national, we have always steadfastly insisted upon according private property full protection in the event of war. We have no reason to assume that this policy will be departed from in the future (p. 17).

* * * * * * *

Under subsection (j) of section 9 of the existing law no patent could be returned which had been sold, licensed, or otherwise disposed of or which was involved in litigation, nor could the proceeds from the sale, license, or other disposition of any such patent be returned. Inasmuch as the *Chemical Foundation* case has now been decided, there is nothing to prevent the return of all patents and such proceeds still held by

the Alien Property Custodian. Subsection (j) of section 9 of the existing law is accordingly amended to comprise two subsections, the first of which (subsec. [j]) provides for the return of patents which have been licensed, subject to any existing license, contract, lien or encumbrance, and the second of which (subsec. [k]) provides for the return of the proceeds received from the sale, license or other disposition. These subsections do not affect the sale to the Chemical Foundation nor the consideration received upon that sale, nor the sales to any other private interests.

Under subsection (f) of section 10 of the existing law the Alien Property Custodian has instituted certain suits as the 'owner' of certain patents. In the event that it should ultimately be held that the suits were properly instituted the amendment proposed by the bill provides that section 9 shall apply to any royalties paid to him. Section 10 of the Trading with the Enemy Act contains the provisions applicable (prior to any seizure by the Alien Property Custodian) to the licensing of patents, etc., prescribes the royalty to be paid, and gives to the owner of the patent the right to file a bill in equity against the licensee at any time before the expiration of one year after July 2, 1921 for the determination and payment of a reasonable royalty." (Report to accompany H. R. 7201, Committee Print (undated) and Report No. 273, 70th Congress, First Session, dated Feb. 9, 1928.)

Reason for Enactment of Section 19 of Settlement of War Claims Act.

The Committee Print of the Report contained the following sentence immediately following the word "royalty."

> "Inasmuch as this section accorded full rights to the 'enemy' owner, no amendment is proposed."

This is inaccurate, and obviously was inserted in the report upon the mistaken assumption that the Alien

Property Custodian had brought suits in every case where licenses were issued (Text of Report, *supra*).

The sentence does not appear in Report No. 273 (Text *supra*).

The Senate's desire however to "accord full rights to the enemy owner" is manifested on the floor of the Senate.

Senator Smoot, Chairman of the Finance Committee, presenting the Conference Report on the bill, containing Section 19, on February 28, 1928, said:

> "The Senate amended subsection (f) of section 10 of the trading with the enemy act so as to provide that suits for reasonable royalties brought either by the original owners of the patents or by the alien property custodian should be considered as having been properly brought for the purposes of this section. It will be noted that subsection (1) of section 9, added by section 13 of the bill, provides that royalties recovered by the alien property custodian in suits instituted by him will be returned under section 9 to the former German owner. The House receded." (Congressional Record, February 28, 1928, p. 3800).

The intent of Congress, set out in the original Trading with the Enemy Act of 1917, is to permit compensation for acquired use (Sec. 10 [f]).

The intent of Congress set out in the Settlement of War Claims Act of 1928 is to permit compensation for use prior to disposition of the patents on April 10, 1919 (Sec. 10 [f] as amended by Sec. 19 of the Settlement of War Claims Act).

During these eleven years, what happened to show any deviation from this intent?

The reply will be the amendment of November 4, 1918 of the Trading with the Enemy Act, permitting the seizure of patents, choses in actions, and rights of every description.

It may be argued that this general language includes the right to compensation. But the right to compensation for the Sovereign's act of confiscation or eminent domain is not *ejusdem generis* with the peace time alien patentee's right and chose in action to enjoin infringement; to sue for damages for unauthorized use, and to resort to the Courts for the collection of unpaid license moneys.

Therefore the Judiciary must by construction read the inclusion of this right into the text of the statute. Else it is not there.

The answer to the latter suggestion lies in the 1928 amendment.

The Congress would not reaffirm the former enemy's right to compensation if that legislative body had ever authorized its seizure and sale.

Summary of the Foregoing.

The presentation of the facts and law, applicable to the case at bar, set out, hereinabove, shows:

(1) That Congress originally intended, and has not changed its intention that the former enemy patentee should recover compensation for the use of his patents. This compensation is confined, by Congress, to use prior to April 10, 1919.

(2) That the Custodian had no power to seize this right of compensation; did not seize the right; and had no power to transfer title to the license fee funds in the Treasury to the Foundation.

(3) That the Foundation never acquired title to the funds in the Treasury by assignment from the Custodian or as an incident of ownership or otherwise; that no assignment by the Custodian, of moneys or right to moneys, in the Treasury may validly be made without express Congressional authorization; and that no valid assignment thereof or claim thereto was made.

(4) That no diversion by Executive or Judicial action of the license fee funds in the Treasury is permissible without, and in strict accordance with, express legislative sanction.

(5) That Sec. 10, subs. (f) of the Trading with the Enemy Act remains unrepealed and unamended since original enactment, except by Sec. 19 of the Settlement of War Claims Act of 1928, which makes disposition of the license fee funds.

II.

The Issues before the District Court.

The issues before the District Court were:

(1) Shall the alien petitioners recover reasonable value for the use and enjoyment of their private patent property prior to April 10, 1919;

(2) Shall the motion of the licensee DuPont to dismiss the bills of the alien petitioners be granted;

(3) Shall the motion of the Custodian to have himself substituted for the alien petitioners, as plaintiff, be granted;

(4) Shall the prayer of the Foundation for judgment, for reasonable value for use and enjoyment of former enemy patent owners' property, under Presidential licenses, subsequent to April 10, 1919 be granted; and

(5) Shall the Treasurer's motion to dismiss the Foundation's bills be granted.

The decrees and orders of the lower Courts declare the *right* of the Foundation to all of the accrued royalties, before and after April 10, 1919, but grant relief, according to the prayer of the bills, for the period only after sale of the patents.

This action leaves the accruals for the period before sale of the patents, undisposed of.

Exactly the reverse condition should exist.

The reasonable compensation for use and enjoyment from October 6, 1917 to April 10, 1919 should be paid, according to the statute, to the alien petitioners and the excess, if any, returned, on the order of the Court, to the licensee who paid the funds.

The Foundation is not now, and never has been, by seizure, assignment or otherwise, entitled to any part of these American moneys, originally and consistently declared by the Congress to be "trust funds" for the enemy owner and the American licensee.

Discussion of Opinion of the District Court.

The District Court was of the opinion that the issue before it was "whether the German plaintiffs have established that they are the respective owners of the several patents within the meaning of Sec. 10 (f) either as originally passed or as amended" (R., f. 180, p. 140).

It is difficult to coincide with this conception of the issue in view of the language of Sec. 19 that "any suit brought within the time limited" shall be considered as having been brought by the owner within the meaning of the Act, so far as such suit relates to royalties prior to sale *if brought by the person who was the owner immediately prior to seizure* and in view of the Court's further statement "that the German plaintiffs were the respective owners of the several patents at the time the license was granted and that they continued to be the owners thereof until the seizure of the patents by the Alien Property Custodian is not disputed" (R., f. 180, p. 140).

The principal issues before the Court were whether Sec. 19 of the Settlement of War Claims Act of 1928 should be given effect, and, recovery by the former enemy owner be permitted, for use prior to sale, in the nature of a reasonable royalty, and further whether any recovery should be permitted to the Chemical Foundation (R., f. 177, p. 137).

For the period before sale there were no suitors before the Court except the alien petitioners. The jurisdictional facts were conceded (R., f. 180, p. 140).

The District Court, denying recovery to the alien petitioners, was of the opinion that the statute empowered the Custodian to seize "royalties"; that he did seize the "accrued royalties" and thereupon became the owner thereof; that by virtue of the statute, the Presidential Executive Orders and the Custodian's assignments, the Foundation became "the owner of the choses in action or right to recover the accrued royalties" (R., ff. 184, 185, pp. 143, 144).

The Court was of the further opinion that there was no sale of "money" to the Foundation by the Custodian; but a sale of "choses in action" (R., f. 188, p. 147).

The Court was of the further opinion that the license fees were *"damages for infringement"* (R., f. 183, p. 142). It was also of the opinion that the moneys paid to the Treasurer *were in no sense "royalties or damages for infringement"* but merely a "surety fund" to which the plaintiff suing for "use and enjoyment" may resort (R., f. 188, p. 147).

The Court's view of Sec. 19 was that unless it "divested the Foundation of the right and revested the Germans therewith" the German plaintiffs had no cause of action (R., f. 185, p. 144).

As to this Act, the Court's views were:

That if the passage of the amendment was in pursuance of Congress' war powers "that fact constitutes

a denial that the amendment was intended to operate upon or with respect to the choses in action here involved; that the "choses in action" having been on April 10, 1919 "sold and passed into the channels of commerce under the express authority of Congress," the war powers of Congress with respect thereto were *functus officio;* that after its sale, the Government no longer held it and it no longer bore the stamp "captured property"; that captured property sold under authority of Congress to American citizens passed from under the powers of Congress touching captured property; that the property to which the Congress reserved the right to make disposition did not include that sold under its authority during the war; that which was sold was choses in action; that these were assignable; that it can not be assumed that the Congress intended to violate the terms of the trust or appropriate to its own use money held in trust; that Congress did not reserve the right to make disposition of these moneys after the war; that on the contrary it expressly excepted these moneys from that reserved power (R., ff. 185, 187, 189, pp. 144-147).

Therefore, the Court was of the opinion that the alien petitioners having had no cause of action at the time their suits were entered or at any time since, their bills should be dismissed (R., f. 189, p. 147).

Although the Foundation had not sued for the royalties accruing before sale, the Court was of the opinion that such election not to sue "did not operate as an assignment of its right to the German plaintiffs or the Custodian" and that the right to *future* royalties passed to the Foundation, by purchase, as an "incident" (R., ff. 185, 189, pp. 144, 147).

The fundamental misconception of the lower Court is that the Congress authorized the Custodian to seize

the enemy's post bellum right to compensation for the taking of private property; that the Custodian, pursuant to this authority, did seize the right and pursuant to further Congressional authority, did transfer the right to the Chemical Foundation, Inc., a private corporation.

From this fundamental misconception flow all the errors of reasoning present in the Court's opinion.

The Congress has stated its intent in Sec. 10 (f) as originally enacted; never repealed and as amended in 1928 in the Settlement of War Claims Act (Sec. 19). This is final. The views and rulings of the Judiciary may not affect this decision.

The Congress has asserted in the amendment of 1928 that it never authorized seizure or disposal of the right to compensation. No language to the contrary appears in any previous enactment. As specific authorization to seize the right is absent from the statute, the Courts imply its existence. This is a law making power not granted to the Judiciary in the Constitution.

Specific seizure of the right is absent from the Custodian's demand. The Custodian acquired only that which the demand specified.

Therefore, in addition to inferring the grant of authority, the Court assumes the seizure by amplifying the language of the document of demand, which it regards as "sufficiently comprehensive" to embrace the seizure of this right.

The supplemental assignment of the Custodian does not change the situation. The language of that assignment is merely of rights acquired by the seizure. The enumeration therein of rights not seized, in the demand, is of no avail. The expression of the Custodian's *intention* to seize or of the President's intention to authorize seizure, not consummated, is ineffective.

Consequently, as the Court's basic premises are wrong, the conclusions therefrom are equally wrong.

That the right to compensation had passed into the channels of commerce is not borne out by the facts. And that Congress was *"functus officio"* as to the money in the Treasury is not borne out by the law. We cannot conceive how Congress can ever be *"functus officio"* in discharging a Constitutional duty.

That Congress reserved no power to dispose of property sold under its authority is a conclusion based upon a non existent fact.

That Congress is consistent in its conception of the trust fund nature of the license fees and had no intention of divesting the Foundation of something it never possessed is also apparent from consideration of the undisputed facts and the unrepealed statutes.

The Court's determination, we think, loses sight of the "non-enemy" nature of the license fee funds; of the absence of Congressional authority to seize the same; of the failure of the Custodian to seize either the enemy's right to sue or the enemy's right to compensation, or the enemy's rights, if any, in the funds in the hands of the Treasurer, and of the further fact that the Custodian had no power of disposition of money, not even of enemy money, directly or indirectly, under guise of transfer of "choses in action" or otherwise.

Specific transfer of the right of suit is absent from the first assignment. Without new demand, it appears, in terms, in the second assignment. Therefore, the Custodian attempts to transfer that which he never seized.

The "chose in action," if it be a chose in action, runs merely to the *quantum*.

The fund was the People's until it was surrendered by the People to the persons the People intended should receive it. These persons, primarily, were enemies; secondarily, American licensees.

The real claim of the Foundation, therefore, is to the fund and to the further right to collect additional funds, by way of reasonable royalty, from the American licensee, under continuations of these licenses, until the expiration of the patents. Such course might be proper under Foundation licenses issued as an incident of ownership; but not under Governmental licenses, encumbering the patent, at the time of seizure and transfer of the patent.

Title to the fund, must pass by the assignment, to make the same effective. This was attempted in the second assignment.

That such attempt to dispose of funds or interest in funds, without Congressional appropriation, is contrary to the Constitution, is obvious.

The Foundation's further position, therefore, is that as "owner" it fits into the *designatio personarum* of the Congress set out in Sec. 10 (f) of the Trading with the Enemy Act, authorized, after the war, to sue for compensation for war time use, by Americans, of enemy patents. That Congress contemplated in the Act no devolution of title from enemy patentees to American beneficiaries of Congressional reparation for the taking of private property, is apparent from the text of the Act as amended.

During the war no American could accept an assignment from the enemy patentee, even of his patent, without "trading with the enemy" (Sec. 3).

In no Act of Congress is there any indication of an intention to permit the enemy or the Executive or Judicial Departments of the Government to dispose of indemnity or compensation for the taking of private property, to citizens of the United States.

In recognition of the laws of nations, the *jus belli*; the Rules of Land Warfare and the traditions of the

country, the Congress determined to compensate enemy patentees for the use of their private property found in America at the outbreak of hostilities, and existing here under the assurance and protection of American laws.

This determination is expressed not only in the original Trading with the Enemy Act but also in the Winslow Acts and the Settlement of War Claims Act of 1928 and in the reports of the Congressional Committees handling this legislation.

Only the action of an official of the Executive Department interferes with the operation of the Congressional policy. Such action must yield to the superior legislative will.

No hurt to Americans arises from an execution of the Congressional policy.

The American assignee of the patent, for the life thereof, may exclude the former enemy owner from using, even in peace times, his own inventions. This is a post bellum penalty. Further it may profit from its licensing since 1919 of the patents to Americans.

It might have persuaded all Presidential licensees to surrender their governmental licenses and take licenses from it.

It is deprived of no right it ever possessed, or ever asserted, if the former enemy patentee receives the Presidential license fees accruing before sale.

It is deprived of no right it ever possessed if the fee accruals, after fair compensation to the alien owner, are returned to the American who paid them. The Foundation could not sue any Presidential licensee for infringement, after it became the Custodian's assignee. Its assignment was subject to these existing and outstanding licenses.

Its position is that by Congressional benevolence and Executive grant, the compensatory funds, in the Treasury, for private property appropriation in war time, belong to it, as an incident of patent ownership and by *executive* assignment, and that its rights are superior to the statutory rights of the American licensee and the former enemy.

The Constitution is clear that the Congress has power to dispose of and make all needful rules and regulations respecting the property of the United States and nothing in the Constitution shall be so construed as to *prejudice any claims of the United States* (Article IV, Sec. 3).

The license fee funds in the possession of the Treasurer are trust moneys, until they are disposed of as Congress directs. The right to possession of these moneys is in the United States. The Executive and Judicial departments of the United States must dispose of the same in accordance with the will of the Congress, which has authority to "make all laws which shall be necessary and proper for carrying into execution" the power of Congress to "make rules concerning captures on land and water" (Article I, sub. 8).

As to this disposition the Congress has spoken. The Foundation asserts its right to contravene the Constitutional and statutory mandate.

Discussion of Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals was of the opinion that under proper statutory authorization the words employed by the Custodian, in his seizure, to wit: "every right, title and interest with respect to" the patents included "royalties" (R., f. 255, p. 189).

The Court was of the further opinion that the Custodian specifically sold to the Foundation the "rights to receive moneys by way of royalties or otherwise as compensation for the use of patents" (R., f. 258, p. 194).

The Court was of the further opinion that the alien petitioners were not the owners of the patents or the royalties, at the time of suit (1922) unless the amendment under consideration "ruthlessly divested the party who acquired ownership by capture, or the party who later acquired ownership by purchase from the captor, of his ownership in the royalties and revested it in the original owners" (R., f. 256, p. 190).

The Court found "no statute whereby the Congress divested or seemingly intended to divest a vendee of ownership in property lawfully seized and lawfully conveyed and revest it in the Custodian" (R., f. 258, p. 194).

That Congress, in Sec. 10 (f) of the Trading with the Enemy Act, as originally enacted, had no intention of divesting even the enemy patentee of his entire ownership of his patent, is perfectly apparent.

That the Congress, in this statute, had no intention of divesting the emeny of his right to compensation for the property rights captured is equally apparent.

That Congress, in all of its subsequent amendments authorized capture only of *existing* rights useful to the American People in the prosecution of a war, is equally obvious.

That Congress, *in no legislation* has authorized confiscation of post bellum private rights, conferred upon former enemies, is also clear.

That Congress in no enactment has provided for post war penalization, indemnities, reparations, levies,

contributions or forfeitures affecting former enemy nationals is quite beyond controversy.

That Congress in both war and peace legislation has never had any intention of dedicating trust moneys, accruing during the war period, to private uses, after the war, is absolutely certain.

The appropriation of rights, belonging either to citizen or alien, maturing only after the war, is the taking of private property without due process of law.

The confiscatory rights of a belligerent cease and determine upon the resumption of the belligerent's status of peace amity and concord.

We fail to observe any reference by the learned Court to any statute specifically authorizing the seizure of post bellum compensation.

If the authority in the seizing official is absent his act of seizure is a nullity. So would be his act of assignment and conveyance of that which he did not seize.

The Court must *infer* the existence both of authority and seizure. General terms in the statute and the seizure are resorted to, for this purpose.

Congress has settled the error of these assumptions by its statute of March 10, 1928, settling war claims, in accordance with its Constitutional and reserved power. Its committees, in addition, leave the matter of intent, in no doubt.

Assuming that the United States, in 1917, by the exercise of the right of eminent domain, appropriated the patent rights of an American citizen, or an alien neutral, and assigned the same together with "every right, title and interest with respect thereto" to an American corporation, there can be no doubt that the right to compensation for the taking would not pass under the assignment. Otherwise there would be no

compliance with the Constitutional restriction upon private property taking without compensation.

This argument applies equally to the peacetime rights of former enemy aliens.

III.

Consideration of "Choses in Action."

On October 6, 1917, after the Trading with the Enemy Act became effective, the only exercisable chose in action possessed by the enemy patentee was that given by the statute to prosecute, by attorney in fact, despite the existence of a state of war, non-licensee infringers (Subd. (d) statute).

So long as the war persisted, that was the only "chose in action" the enemy *qua* enemy possessed.

That "chose in action" was specifically captured in the language of the Custodian's seizure and demand, recorded in the Patent Office. The validity of that part of the seizure is not now before the Court.

After the war, when his belligerent nationality had been converted by the Proclamation of Peace into his original peaceful status, then and there, but not before, the Congressional assurance of proper compensation ripened into a "right" inuring to the former patentee and he became possessed of a peace time "chose in action" to resort to the Judiciary for the fixation of *quantum* for the "rights" he had been deprived of forever.

Logic compels, therefore, the irresistible conclusion, from these inescapable facts, that the Custodian in his after-thought assignment endeavored to assign, as a capture, that intangible right, conceived, it is true, in the Congressional imagination, but having no existence

except in the realm of legalistic fiction, until the cessation of an undetermined, inexact, indefinite period of hostilities.

The Trading with the Enemy Act defined the status of "enemies" and of their capturable property and possessory rights, as of the date the same became effective. It carried no authorization to capture rights accruing only after the war ended. The capture powers of the Custodian ended upon the declaration of Peace. Confiscation of alien or domestic property is no peace time policy of the American Government. War time executive action effective as confiscation *in futuro*, on peace time property, or property rights, has been, and still is, absent from legislative sanction of the American Congress since the birth of the Republic.

The enemy's "right" acquired existence only upon the instant the Custodian's seizure powers expired. The President's Proclamation of Peace gave life to the embryo "right" and placed, simultaneously, the quietus upon the Custodian's seizure activity. The Proclamation changed the "enemy" into friend and removed the rights of that new "friend" from the jurisdiction of an official whose war power of capture terminated. There could be no peace time seizure, *ex post facto* as there could be none in war time, *nunc pro tunc*.

No power was vested in the Custodian to refund any part of the purchase price of enemy property sold by him, from trust or enemy moneys, directly or indirectly. Nor was power given him to assign compensatory financial advantages in diminution of the original cost to the transferee. No authority lay in him to make a gift of trust or enemy or American licensee moneys to the assignee of enemy patents. To hold the contrary would render nugatory the still existing pro-

visions, unrepealed, of Sec. 10, subsec. (f) as amended by the Statute under consideration.

No difference exists between the right to compensation for captured property, given in the statute, and the right to sue for the fixation of the *quantum* of such compensation. One is the right to compensation; the other is the right to pursue the statutory method provided to obtain it. Transfer of the right to sue is transfer of the right to recover.

The lower Courts' decision places the assignee, by money payment, into the identity of the enemy to be benefited by the taking for war purposes.

The Custodian's assignee obtains compensation for citizens' use of the enemy's patents. It may resort to the fund paid *before* it was the Custodian's assignee. Not in existence before 1919, the Court declares it entitled to benefits arising in 1917 and 1918.

Nowhere in the report of the Alien Property Custodian or in the reports of the hearings before Congress, is there any suggestion of capture of the right to compensation nor of any desire or intention to authorize the assignment of this right to private persons.

Without Congressional authorization, the Executive Department has power neither to create a claim against trust funds in possession of the United States nor to dedicate moneys in the Treasury to public or private purposes.

The actions of officials of the Executive Department must be scrutinized now in the light of the Settlement of War Claims Act.

Authority for their war time action must exist, if at all, in the enactments of Congress.

The Treaty of Peace, in 1921, permitted the People to foreclose the enemy, if the People so desired, from seeking this compensation.

The Settlement of War Claims Act of 1928 expressed the Congressional intent *not* to *deny* to the enemy non-combatant the right to compensation for the use of his appropriated inventions, for the period from October 6, 1917 to April 10, 1919.

IV.

Sec. 19 of the Settlement of War Claims Act of 1928, amending Subs. (f), Sec. 10 of the Trading with the Enemy Act, is a valid exercise by Congress of its Constitutional powers.

The power to declare war and to "make rules and regulations concerning captures on land and water" is vested by the People of the United States of America in the terms of the Constitution, in the Congress (Art. I, Sec. 8, Clause 10).

So also is the power to make all needful rules and regulations respecting property belonging to the United States (Art. I, Sec. 3, Clause 2). Also the power to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the Government (Art. I, Sec. 8, Clause 17).

Mr. Justice Miller has written that "unquestionably it was within the power of Congress to provide a full code of procedure" for the disposition of captured property (*Tyler* v. *DeFrees*, 11 Wall. 344).

This Court has upheld the Constitutionality of the Trading with the Enemy Act in *White* v. *Mechanics Securities Corp.*, 269 U. S. 300; *Stoehr* v. *Wallace*, 255 U. S. 242; *Commercial Trust Co.* v. *Miller*, 262 U. S. 57 and *Sanchez* v. *Beering*, 270 U. S. 227. In the latter

case, Mr. Justice McReynolds said: "The duly expressed will of Congress when proceeding within its power is the supreme law of the land."

From the foregoing, it seems beyond question that the Trading with the Enemy Act and Sec. 19 of the Settlement of War Claims Act of 1928 are expressions of the Congressional power, under the Constitution, to regulate captures on land and water.

V.

Contention as to Unconstitutionality.

Contention of DuPont.

Both DuPont and the Foundation raised the issue of constitutionality below. DuPont was of the opinion that the operation of the statute "constitutes an interference with vested rights in contravention of the Fifth Amendmen to the Constitution."

DuPont contended that the right to compensation for the use of the patents had passed by assignment to the Foundation. That as the Foundation, as owner, within one year after the war, had brought no suit for the recovery for use and enjoyment, prior to April 10, 1919 "the right to institute suit was forever barred"; and that, therefore, all rights with respect to royalties for this period, "became a vested property right" of DuPont. Further, that Congress could not, "by subsequent legislation, invade such vested property rights" and deprive DuPont "of its property without due process of law." The quoted matter is from DuPont's brief in the District Court (pp. 37-45).

In its brief submitted to this Court in opposition to the issuance of writs of certiorari, DuPont contends that

the act "would by reinstating a liability which had become extinguished deprive the licensee (DuPont) of its property without due process of law in contravention of the Fifth Amendment" (pp. 21-22).

The "rights" which DuPont contends this legislation takes from it are exceedingly vague and nebulous.

No money is taken.

In its District Court brief, DuPont says: "It does not seem to be disputed" that DuPont "did not pay to the Alien Property Custodian, or to any other person, any royalties for the use of the patents here involved prior to April 10, 1919" (Brief, p. 34; R., p. 43, f. 51).

No tangible property is taken. The intangible "vested rights" accordingly, therefore, must be (1) immunity from suit by the former alien enemy; (2) right in a statute of limitations; (3) reinstatement of extinguished liability and (4) property rights "with respect to royalties" for the period prior to sale.

Inquiry, naturally, should be directed to the questions of whether any of the foregoing were either "rights" or "vested."

First, as to immunity from suit.

DuPont took its license and paid its money for use and enjoyment of enemy patents with the statute on the books giving the enemy owner the right to sue it after the war and obtain a continuance of royalty payments or a cancellation of the license. Also they might have an examination of DuPont's books and a scrutiny of sales and profits, and a determination as to liability to pay reasonable compensation for use and enjoyment of the alien petitioners' inventions during this period. This regardless of any rate of license fee fixed by the Federal Trade Commission. Also the alien petitioners might examine the "extent of use"

which the statute required DuPont to disclose to the Federal Trade Commission (Subd. [d], statute *supra*).

The post bellum suit was the only suit the *enemy* owner could bring against DuPont (subd. [d]).

The former enemy did bring this suit. He brought it within the statutory period, and while the enabling statute stood unrepealed. The operation of this statute, says DuPont, was rendered nugatory by the action, not of the legislative department, but of the executive department. The executive, he contends, took away what the legislature had granted the enemy and substituted a new party, as owner, to whom DuPont had the right to look for suit. Therefore, the legislature's enactment no longer had any force or effect.

This argument is founded on the misconception that Congress authorized the seizure and disposition of the post bellum right to compensation for Sovereign seizure and that the same was seized and transferred to the Foundation.

Secondly, as to DuPont's "vested right" to the defense of the Statute of Limitations.

Obviously DuPont took his license with the clear understanding that some "owner" had the right to sue. Congress originally enacted that the enemy owner had this right. The amendment reiterates the right in the former enemy.

Thirdly, as to "reinstatement of extinguished liability."

This is a contention that from July 1, 1922, one year after the Peace, no person could sue him, the Foundation having failed to do so, and that if he had paid moneys as royalties for the period before sale, he would be entitled to the return of the same.

Very properly he might contend, but does not, that the Court's present decree deprives him of the right

to get his money back, in excess of reasonable royalty for use prior to April 10, 1919, in that the Court has permitted an "owner" never contemplated by the statute to sue him.

His liability to pay royalty was never extinguished by the Congress and thereafter reinstated. The suit brought within the statutory period was validated.

Fourthly, DuPont never has possessed and does not now possess any "vested" rights in royalties accruing in any period. He had the statutory right as a Congressional *cestui que trust* to the return of his money paid as license fees, if the enemy owner did not sue within one year after the Peace. This the former enemy did. Undoubtedly, DuPont has, now, the right to the return of any excess over a reasonable royalty for the period prior to April 10, 1919. It would seem clear, from the foregoing, that the statute under consideration, viewed in the light of the consistent policy of Congress has deprived DuPont of no property or right to property or "vested right" of any kind whatsoever.

Contention of the Foundation.

The Foundation in its briefs below contended that the statute is unconstitutional (District Court Brief, pp. 28-31; Circuit Court of Appeals Brief, pp. 36-44).

In the District Court brief it was said that:

> "If, as the German plaintiffs contend, it created, or reinstated, for their benefit, causes of action which had either never existed or had ceased to exist, it is unconstitutional. While Congress may, in some cases, by removing the bar of a statute of limitations, revive a bar to claim which has an independent origin and is subject to no other defect, it cannot revive such a claim when the limitation was a part or term

of the original right, and that right was created only by the statute which imposed the limitation.

* * * * * * *

The Foundation when it bought the property, and the licensee when it took out the license, each entered into a contract with the United States among the terms of which the provisions of the existing law were an essential part. The Foundation bought and sued in reliance on the statutory provision that an 'owner' (meaning an owner of the patent at the time of suit) and only such an owner could use. The licensee entered on its vast undertaking in reliance on the statutory provisions which limited its liability to one suit only. Congress could not thereafter take away part of the rights which the Foundation had bought. Neither could it subject the licensee to suit by other plaintiffs.

If construable in such manner as to revivify the German suits the amendment would also be objectionable as a legislative usurpation of judicial functions."

In the Circuit Court of Appeals the brief set out that:

"We have already shown, as we believe, that nothing ever vested in the German owners except a right which must necessarily end with a transfer of ownership of the patents, and that that right passed to the Custodian both by a separate act of seizure, and also by the mere seizure of the patents, which took from the Germans and gave to the Custodian the indispensable qualification as 'owner of the patent,' without which the right could not be held. Each of these separate sources of the Foundation's title—the seizure of the rights themselves, and the patent-seizure—operated alike on the rights for all periods, without distinction. The separate seiz-

ure took every right the Germans had 'with respect to' the patents, past and future, without any exception of those already accrued. The patent-seizure took from them the whole of their qualification to sue, whether for past or future use and enjoyment."

"While we contend that in fact that fund arose out of use and enjoyment after assignment, it is plain that, however, it arose, the Foundation, as the sole possible plaintiff qualified as 'owner of the patents' to sue, is entitled to the benefit, as security, of the whole fund provided to secure the decree in the suit so brought. This is a substantial right, whcih was fully vested in the Foundation long before the 1928 Amendment was enacted. It is property of which the owner cannot under the Fifth Amendment be deprived without due process of law. The Foundation is therefore directly affected by and interested in the question of the statute's constitutionality."

These contentions are that the Congress usurped judicial functions; that the right to compensation passed not only by direct and express transfer but also as an incident of ownership and that the right in the Foundation to look to the funds as "security" is a vested property right.

Disposition of war captures is a constitutional power of Congress, belonging not to the Judiciary. The right to compensation for capture does not pass as an incident of ownership to transferees of patents. That this compensatory right was neither captured nor transferred has hereinbefore been demonstrated. That the Foundation never acquired and now possesses no "vested" or other right in the funds, as security or otherwise, is amply clear from the foregoing.

It is firmly established that the Constitutionality of a statute may not be attacked by one whose rights are

not affected by the operation of the statute. It is incumbent upon litigants to show that they are within the class with respect to which a law is unconstitutional and that the alleged unconstitutional feature injures him and so operates as to deprive him of rights protected by the Constitution. (*Hatch* v. *Reardon*, 204 U. S. 152, 161; *Southern Railway* v. *King*, 217 U. S. 524, 534; *Standard Rock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544,—[cited in *Louisville & Nashville R. R. Co.* v. *Finn*, 235 U. S. 601]).

It is an axiom in our jurisprudence that an Act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law. (*U. S.* v. *Rhodes*, 1 Abb. U. S. 49; 4 Wheat, 316, 9 Wheat 1; *Hepburn* v. *Griswold*, 75 U. S. [8 Wall.] 603-607; *Fairbank* v. *United States*, 181 U. S. 285; *The Mayor* v. *Cooper*, 73 U. S. [6 Wall.] 247-251).

It is not the duty of the Judiciary to make or modify the law (*Bank* v. *Sherman*, 101 U. S. 403, 406).

But to give effect to the will of the law-making power when expressed within the limits of the Constitution. (*Barney* v. *Latham*, 103 U. S. 205, 212).

We quote one further observation of the Foundation in its District Court brief to the effect that "However sweeping the power of Congress to settle war disputes may be, it cannot include the power to settle them long after the war is over, by confiscating the property of American citizens" (p. 40).

Thus does the beneficiary of confiscation designate the Congressional denial of intent to confiscate.

Views of the Lower Courts on Constitutionality of Sec. 19.

The remarkable feature of the decisions of each of the lower Courts is that while failing to give effect to the provisions of Sec. 19 of the Settlement of War Claims Act of 1928, neither Court declares the same to be unconstitutional.

The Circuit Court of Appeals said:

> "The right to the accrued royalties in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution. Subscribing to the reasoning of the learned trial judge, we hold that the Amendment of 1928, valid and useful perhaps in many situations, did not restore to the German plaintiffs ownership of either the patents or the royalties. It follows that they did not own the royalties when they filed their bills—the critical time under the statute supplying the remedy—and that, in consequence, the decrees dismissing their suits must be affirmed * * *. We subscribe to the reasoning of the learned trial judge on the main issue and the related issues of these cases and direct that the decrees be in all respects affirmed."

And the Court then rules that the alien petitioners did not own the royalties when they filed their bills (in 1922) "the critical time under the statute supplying the remedy."

The "critical time" under the amended statute which is the criterion of ownership is "immediately before seizure" (Statute, *supra*).

The District Court held:

> "The German plaintiffs are without cause of action and without right to recover from the defendant the accrued royalties unless by the amendment of March 10, 1928 to Sec. 10 (f) of the Trading with the Enemy Act Congress divested the Chemical Foundation of its right and revested the Germans therewith. That right is a chose in action. A chose in action is property. The fifth amendment to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, denies to the Congress power to transfer property from one to another directly or indirectly. *Ochoa* v. *Hernandez*, 230 U. S. 139, *Gilman* v. *Tucker*, 128 N. Y. 190, 28 N. E. 1040. In the former of these cases the Supreme Court, holding that even if the commanding officer in territory occupied by military forces of the United States has all the legislative power as to such territory possessed by Congress, he is still subject, as Congress is, to the provisions of the fifth amendment and cannot by military orders deprive persons of their property without due process of law, said, p. 161:
>
> 'Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.'"

And the Court then holds that the right to sue for royalties having been, under the authority of Congress, seized and sold, Congress was "*functus officio*" as to this chose in action.

Unconstitutionality is referred to merely *en passant*. More than once, below, the distinguished Mr. Cooley's

observation that "there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or by special enactment" (Constitutional Limitations [8th Ed.] Vol. 2, p. 744) was referred to. We subscribe to this statement.

VI.

Sec. 19, as aforesaid, is part of the supreme law of the land, binding on the District Court and the Circuit Court of Appeals.

The District Court and the Circuit Court of Appeals of the various Circuits are creations of the Congress under their power to ordain and establish Courts inferior to the Supreme Court (Article III, Sec. 1).

The judicial power is limited by Article VI, Section 3 of the Constitution which provides that the Constitution, and the laws made by the Congress pursuant therto, with treaties, shall be the supreme law of the land, binding on the judges in every state, anything in the Constitution to the contrary notwithstanding.

Judicial officers are bound by oath to support the Constitution (Article VI, Sec. 3).

Federal Courts have no jurisdiction except that conferred by the Federal Constitution or federal statutes. (*Rice* v. *Minnesota & N. W. R. R. Co.*, 1 Black 358, 374; *Kempe* v. *Kennedy*, 3 Cranch 173).

The inferior courts are "mere creatures of Congress" and possess "no powers except those specifically granted to them by an Act of Congress." (*Lewis Publ. Co.* v. *Wyman*, 152 Fed. 200; *Stevenson* v. *Fain*, 195 U. S. 165).

Congress has "specifically granted" no power to the inferior judiciary to override or disregard an Act of Congress.

The provisions of an act of Congress passed in the exercise of its Constitutional authority, if clear and explicit, must be upheld by the Courts. (*Fong Yue Ting* v. *U. S.*, 149 U. S. 720).

It is clear from the foregoing that Sec. 19 of the Settlement of War Claims Act of 1928 is part of the supreme law of the land, binding upon the judges in every state.

VII.

Conclusion.

The basic inquiry, in this case, is: Did the Congress authorize the seizure and sale of the enemy's right to compensation for the use, under Sovereign authority, of his private property; and pursuant to such authority did the Custodian seize and sell this right to the Foundation?

The lower Courts have resolved this question in the affirmative.

Affirmance of the decrees and orders of the lower Courts necessitates the finding that the Congress intended to authorize the appropriation of the enemy's statutory right to compensation for use of patents and its disposition by the Custodian.

It necessitates further the finding that Congress wished to deviate, as to enemies, from the Constitutional provision that Private Property shall not be taken without just compensation.

It necessitates the further finding that the Congress intended to disregard the war conduct principle, previously enunciated, that "Private property can not be confiscated." (H. R. Art. XLVI, par. 2; Sec. 336, Ch. 14, Rules of Land Warfare, promulgated by the Chief of Staff, U. S. A., April 25, 1914.)

The Congress authorized the capture of patent "rights of every description" (Amendment of November 4, 1918). The Custodian conveyed every "right, title and interest" with respect to the patents seized (R., f. 108, p. 83).

The lower Courts have construed these general terms to include the capture and the disposition of the right to compensation. They consider the right to compensation to be a "chose in action" properly capturable and properly captured and properly conveyed to a private citizen. They disregard the resultant fact that the "chose in action" appertained to "money" in the Treasury over which the Custodian had no statutory power of disposition.

The obligation of the contract between the United States of America and the patentee is destroyed. The statutory assurance of seventeen year monopoly is set aside.

The Congressional prohibition as to assignment of claims is passed over. The Constitutional inhibition against private property taking is frustrated.

So long as the American Constitution prevails, there is no question about the inability of Government to alienate by confiscation the citizen's right to just compensation for private property taken. There should be none as to the alien enemy's.

The Custodian's assignment to the Foundation transferred every right of property the alien patentee possessed at the outbreak of hostilities. The lower Courts now add thereto the proceeds of compulsory licensing.

The Foundation becomes the beneficiary of the "trust funds." The original rights of both enemy and licensee as *cestuis* disappear.

The Government took over the alien patentee's licensing power before the Foundation became the owner of the patent.

For this period's avails (October 6, 1917 to April 10, 1919) of use the Foundation now becomes the beneficiary by judicial decree.

This constitutes, in effect, confiscation of the statutory grant of compensation for confiscation.

The intent of Congress, in the Settlement of War Claims Act of 1928 has been declared by the Finance Committee of the Senate of the 70th Congress (Report No. 273) to be the very antithesis of confiscation, not only of the right to compensation for captured property, but also of the captured property itself.

The view of the Courts is that the Congress twice contemplated and accomplished confiscation. First in confiscating the right to license use of the patents. Second, in confiscating the right to compensation.

The ascertainable intent of the law makers must prevail.

In view of all of which it is respectfully submitted that the orders of the Circuit Court of Appeals, Third Circuit, and the decrees and orders of the District Court for the District of Delaware (except the order of the Circuit Court of Appeals, affirming the order of the District Court denying the motion of the Alien Property Custodian to be substituted as plaintiff for petitioners) should be reversed and the cause remanded for appropriate proceedings.

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